In the
Supreme Court of the United States
OCTOBER TERM, 1943

No.

BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY, STATE OF OKLAHOMA; JOHN MALTSBERGER, County Treasurer and AMOS TETER, Tax Assessor of Pawnee County, State of Oklahoma,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED

This case challenges the constitutionality and, alternatively, the misapplication by the Secretary of the Interior, of an Act of Congress authorizing said Secretary of the Interior to acquire agricultural and grazing lands in proportion to the respective needs of the Indian or Indians for whom such lands are purchased, providing that the title thereto shall be taken in the name of the United States in trust for the tribe, band, group or individual Indian for whose benefit such land is so acquired, and providing that while title thereto is held by the United States said lands shall be free from any and all taxes, excepting gross production taxes.

The statute involved is Act of June 26, 1936 (25 U. S. C. A., § 501), which reads as follows:

> "The Secretary of the Interior is hereby authorized, in his discretion, to acquire by purchase, relinquishment, gift, exchange or assignment, any interest in lands, water rights or surface rights to lands, within or without existing Indian reservations, including trust or otherwise restricted lands now in Indian ownership; Provided, that such lands shall be agricultural and grazing lands of good character and quality in proportion to the respective needs of the par-

> ticular Indian or Indians for whom such purchases are made. Title to all lands so acquired shall be taken in the name of the United States, in trust for the tribe, band, group or individual Indian for whose benefit such land is so acquired, and while the title thereto is held by the United States said lands shall be free from any and all taxes, save that the State of Oklahoma is authorized to levy and collect a gross production tax, not in excess of the rate applied to production from lands in private ownership, upon all oil and gas produced from said lands, which said tax the Secretary of the Interior is hereby authorized and directed to cause to be paid."

This case also attacks jurisdiction in the trial court by reason of the fact that federal district courts are prohibited by the Act of April 20, 1940, as amended (28 U. S. C. A., § 41 [1]), from entertaining suits to enjoin the collection or assessment of state taxes "where a plain, speedy and efficient remedy may be had at law or in equity in the courts of such state." The text of said act (28 U. S. C. A., § 41 [1]), is set out in Appendix One following the brief.

The act in question had never been the subject of litigation until the case at bar arose, and, while the tax amount involved within the immediate scope of the action is negligible, the principles of law enunciated by the trial and circuit courts plot for the Secretary of the Interior a future course of action which is of utmost gravity to the tax structure of the State of Oklahoma.

The action was instituted in the United States District Court for the Northern District of Oklahoma by the

United States of America against the Board of County Commissioners, County Treasurer and County Assessor of Pawnee County, Oklahoma, for a decree adjudging to be non-taxable certain real estate which Colonel Moore, a Pawnee Indian, and his wife, had conveyed to the United States of America in trust for certain of his minor children.

In substance, the factual picture is as follows: Colonel Moore, a Pawnee Indian, and his wife, Dollie Moore, on October 19, 1939, executed four warranty deeds conveying four tracts of land to the United States of America in trust. One tract was in trust for their minor child, Wilson Freemont Moore; one tract in trust for their minor child, Regina Margaret Moore, and two tracts in trust for their minor child, Phyllis Sadie Moore.

Colonel Moore was a restricted Pawnee Indian, but the lands conveyed to the United States in trust were theretofore taxable. Each of the warranty deeds referred to hereinabove was approved by the Secretary of the Interior on August 7, 1940.

Wilson Freemont Moore was born on November 1, 1931.

Regina Margaret Moore was born on January 7, 1927.

Phyllis Sadie Moore was born on August 31, 1928.

The oldest of these children is now seventeen years old. The youngest is but thirteen years old. They do not live on the lands conveyed to the United States in trust for them, but reside with and are supported by their

parents (See stipulation appearing on pages 19 to 23 of the transcript of the record).

Colonel Moore's land holdings were so extensive that it became difficult for him to discharge the tax obligations thereon (Transcript, p. 33. He went to Washington to see what arrangement he could make to pay the taxes (Transcript, p. 31). The Indian Commissioner required him to sell some of his land to obtain funds to pay his taxes and devised the scheme or plan of conveying this land in trust to the United States for his children to remove it from the tax rolls. The correspondence introduced in evidence as Exhibits 1 to 11, Transcript, pp. 31 to 46, plainly shows the existence of such scheme or plan to effect a removal from the tax rolls of the land involved. *Colonel Moore was advised to make taxable land the subject of the deed when it was discovered that he had intended deeding a piece of non-taxable land.* See Exhibit 3, letter from Assistant Indian Commissioner to Pawnee Agency, dated May 6, 1939 (Transcript, pp. 32 to 34).

The case was tried upon a complaint, answer, stipulation, certain letters between the Indian Office in Washington, the Superintendent of the Indian Agency at Pawnee, Oklahoma, and Colonel Moore, and duplicate tax receipts introduced in evidence by defendants (petitioners here), showing the tax burden of Colonel Moore.

The trial court rendered its decree adjudging that the lands involved were non-taxable under the act, *supra,* for the years 1941, 1942 and succeeding years, ordered said

lands stricken from the tax rolls, and enjoined the appellants from proceeding to levy and collect any ad valorem taxes against said real estate for such years, or succeeding years so long as the status of said real estate remains unchanged. The trial court held said lands to be taxable for the year 1940. From said judgment, the defendants appealed, and the United States of America took a cross-appeal. In the cross-appeal the United States of America contended that since the lands involved were conveyed to the United States on October 19, 1939, the same were non-taxable for the year 1940, although the Secretary of the Interior did not approve the deeds until August 7, 1940. One transcript of record was certified from the trial court, one brief was filed by each side, and the court wrote a single opinion, although the appeal and cross-appeal were docketed as separate cases. The appeal and cross-appeal involved identical parties and identical subject-matter.

The Circuit Court, on November 26, 1943, affirmed the judgment of the trial court on appeal, and held on cross-appeal that said lands also were non-taxable for the year 1940. The opinion of the Circuit Court is set out in full in the transcript at pages 71 to 79. Mandates of the Circuit Court were issued to the United States District Court for the Northern District of Oklahoma on January 5, 1944. The judge of the trial court on January 10, 1944, issued an order staying enforcement of the judg-

ment under the mandates. A certified copy of said order is set forth in Appendix Two following the brief.

II.

STATEMENT OF BASIS OF JURISDICTION

It is believed that the jurisdiction of this Court to review the judgment in question is sustained by:

Section 240 of the Judicial Code, as amended (28 U. S. C. A., § 347 [a]);

Rule 38, Sec. 5, Subsec. (b), Rules of the Supreme Court of the United States, as amended.

III.

QUESTIONS PRESENTED

Correctness of the Circuit Court's decision holding in effect that:

(1) The trial court had jurisdiction of a suit to enjoin the collection and assessment of taxes imposed pursuant to state law where a plain, speedy and efficient remedy was available in the state courts;

(2) The act in question does not constitute an invalid delegation of legislative power to the Secretary of the Interior;

(3) The Secretary of the Interior could utilize the act to instigate and promote a scheme and plan to remove otherwise taxable land from the tax rolls;

(4) The Secretary of the Interior could acquire land of questionable agricultural and grazing character for minor Indian children living in an urban community not "in proportion to the respective

needs of the particular Indian or Indians for whom such purchases are made;"

(5) The land was non-taxable for the year 1940, although the deeds of conveyance were not approved until August 7, 1940.

IV.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

This case presents questions of extreme importance to the State of Oklahoma. The congressional act under discussion is a recent enactment (June 26, 1936). The action instituted in the federal district court brought for the first time its application and effect into litigation. The decision of the Circuit Court stands until overthrown by this Court as a precedent supporting future action by the Secretary of the Interior in a program destined to remove a vast amount of land in Oklahoma from the tax rolls under the pretended guise of acquiring "agricultural and grazing lands of good character and quality in proportion to the respective needs of the particular Indian or Indians for whom such purchases are made."

Conceding, for the purpose of argument, the constitutionality of the act it is our contention that the Secretary of the Interior may not utilize its provisions to instigate and promote a scheme or plan to relieve an Indian landowner of tax obligations. The ambit of the act, if at all valid, may authorize said secretary to acquire lands for the benefit of Indians under the conditions laid down

therein, but its spirit and purpose may not be perverted to aid and abet a deliberate policy designed to remove land otherwise taxable from the tax rolls. The Indians for whom the land was acquired in the case at issue were minor children living at home with their parents (Transcript, p. 20). The land was rented for an inconsiderable sum (Transcript, p. 20), which of itself, negatives the idea that the land was agricultural and grazing land. The proceeds of rental therefrom inured to the parents to defray the expense of supporting the minor children (Transcript, p. 20). Surely Congress did not have in mind such a utilization of the act when it enacted the same.

While our principal attack upon the act is directed to the manner in which it was applied in the instant case, we are also concerned with its doubtful constitutionality on the ground that it is an invalid delegation of legislative power.

It will be noted that under the act there are only two limitations upon the power of the secretary in acquiring land for Indians. These are: (1) That the land shall be "agricultural and grazing land of good quality and character," and (2) the lands shall be "in proportion to the respective needs of the particular Indian or Indians for whom such purchases are made."

Outside this, there is no limitation whatever on his power. The matter of which Indians are to receive land is left entirely up to him and note that there is no policy laid down requiring him to treat individuals in the same

need alike. The act does not say or intimate that he shall buy for all landless or needy Indians. He *may* buy for any Indian. He is *compelled* to buy for none. If he does buy he must buy agricultural and grazing lands "proportionately to the needs" of the Indian. This is the sole limitation on his power. He may buy for young or old; full-bloods or one-sixteenth blood; for Cherokee or Otoes, or for whomever he chooses. What is worse, he may buy for one Indian and leave another in exactly the same circumstances unprovided for. He may favor his friends and punish his enemies. All this is left entirely up to his unlimited uncontrolled discretion.

There is no intimation in the act of what Congress had in mind. The secretary cannot know what Congress wanted him to do. No policy is laid down, no standard or guide set out. He cannot know whether Congress wanted him to acquire lands for young or old, for those of half blood, or those of fourth blood, those already having some land or those having none. If the secretary exercises the powers given him he must do so blindly, not in furtherance of any legislative scheme, but entirely in accordance with his own desires.

Since this act gives to the secretary the power to decide which Indians shall have land and which shall not, and where, and in what amounts, he, not Congress, has the power to make the law. It is of this that we complain.

Where did Congress lay down any policy or establish any standard whereby the discretion of the secretary in buying these lands was to be controlled? Where is he given to know what Congress wanted him to do? What Indians did Congress intend to benefit by this act?

The government may contend that the secretary is limited in that he may buy only agricultural and grazing lands in proportion to the needs of the particular Indian he buys for. *But* the fallacy is that he does not *have* to buy for any *particular* Indian or *class* of Indians.

Congress did not say that lands should be acquired for all needy Indians. Congress said the secretary may buy for any Indian. Whether he does or not is entirely up to him. He may pick and choose. He may buy for one and not for another. Giving the act the benefit of every doubt the policy of Congress amounts to no more than this:

> *Some* Indians may be given grazing and agricultural lands suitable to their needs.
>
> *Who such Indians may be* shall be left entirely to the Secretary of the Interior.

It is submitted, therefore, that in effect, the secretary has the power to make the law. He decides entirely whether or not old or young, good or bad, full bloods or half breeds get the land. Remember he does not have to acquire land for all who need it. He may acquire for one and not for another. He may favor one and punish another. Congress has delegated to him the uncontrolled

power to make the law and has given him no intimation what it wants that law to be. Such delegation of power is unconstitutional and void.

Further, the attention of the Court is called to the fact that this attempted delegation of power is contrary to the policy laid down by Congress heretofore in acts allotting lands to Indians. Under all of the other acts Indians of a certain tribe or percentage of blood were given definite amounts of land. Always before all Indians of a like class were treated equally. Congress said exactly how much each one should have. Here there is no equity or justice. Of two Indians situated in exactly similar circumstances, one may be given land, the other nothing. It is doubtful if Congress, itself, under its plenary power to deal with Indians, could deal disproportionately with two similarly situated Indians from mere whim or caprice. Certainly it cannot delegate the power to do so.

We further complain that the trial and circuit courts erred in holding that the action was within the permitted jurisdiction of the federal courts. 28 U. S. C. A., § 41 (1) (quoted in Appendix One following the brief), denies jurisdiction in United States District Courts of suits to enjoin the collection or assessment of taxes imposed by the laws of a state where an adequate remedy may be had in the courts of such state. The Circuit Court ruled in its opinion (Transcript, pp. 71 to 79) that it is doubtful whether this provision is applicable to the government,

even though the United States is specifically named in the first portion of the section, but said:

> "We deem it unnecessary, however, to resolve this particular question, since we are convinced that a plain, speedy and efficient remedy at law or in equity in the courts of the state is not available to the United States."

The Circuit Court thus reserved the question as to whether the United States comes within the scope of the act.

It is the contention of petitioners that a plain, speedy and efficient remedy in equity in the courts of Oklahoma is available to the United States in the instant case and the existence of this remedy is settled by state statutes and decisions.

Petitioners urge this Court to resolve this proposition so that there may be established a definite rule to guide the conduct of similar litigation in the state and the federal courts of Oklahoma. The point is left in a disputed state unless, as we here respectfully pray, this Court decides the question.

We contend the Circuit Court also committed error in ruling that the land involved was non-taxable for the year 1940, even though the deeds of conveyance were not approved by the Secretary of the Interior until August 7, 1940. This decision apparently was reached on the theory that the deeds were executed on October 19, 1939, and the approval related back to such date. We assert that such decision is in conflict with general rules of law

which we believe will show that since such deeds were conditional in nature the land was taxable on January 1, 1940, and consequently taxable for the ensuing fiscal year.

Our contentions may be summarized in the following manner:

(1) The Circuit Court erred in ruling that—

(a) the trial court had jurisdiction of the action despite the plain provisions of 28 U. S. C. A., § 41 (1), which denies jurisdiction of federal district courts in suits to enjoin the assessment or collection of state taxes where a plain, speedy and efficient remedy may be had in the courts of such state;

(b) the act did not constitute an unconstitutional delegation of power to the Secretary of the Interior;

(c) the Secretary of the Interior did not abuse the discretion vested in him by the act;

(d) the land was non-taxable for the year 1940.

Your petitioners respectfully contend that a decision of this Court should be had precisely defining the limitation upon the discretion to be exercised by the Secretary of the Interior in order to avoid great confusion and misapplication of the act in the future. Permitted to stand, the Circuit Court decision becomes a precedent for the future guidance of the Secretary of the Interior in cases similar to that at bar in which he may, for the purpose of relieving Indian owners of tax burdens, invoke the provisions of the act in a manner wholly unrelated to the legislative policy and design. The State of Oklahoma, if

the Interior Department is left free to pursue an unhampered and untrammelled course under the act, faces a serious loss of revenue through wholly erroneous application of a congressional act by an administrative officer.

The exercise of discretion by the Secretary of the Interior plays no casual part in the scheme of taxation in this state. Oklahoma still has a large Indian population who are potential beneficiaries under the act and a large amount of property may unjustly and erroneously be removed from the tax rolls unless the act either is declared invalid by this Court or limited to the sphere Congress plainly intended it should occupy.

Petitioners respectfully contend that this case is of such a character that the last word, the ultimate guiding rule should be announced by the Supreme Court as under Rule 38, § 5, Subsec. (b) of this Court:

> "a circuit court of appeals * * * has decided an important question of federal law which has not been, but should be, settled by this court."

Wherefore, your petitioners pray that a writ of certiorari be issued from and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings therein; and that the judgment and decree of the said United States Circuit Court of

Appeals for the Tenth Circuit be reversed by this Honorable Court, and that your petitioners have such other and further relief as to this Court may seem proper.

Respectfully submitted,

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